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Supreme Court of the United States

October Term, 1947.

No. 625

UNITED STATES OF AMERICA,

AGAINST

HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, and CLEVELAND WALTON,

Petitioners.

Petition for Writ of Certiorari and Brief in Support and Motion to Dispense With Printing of Record.

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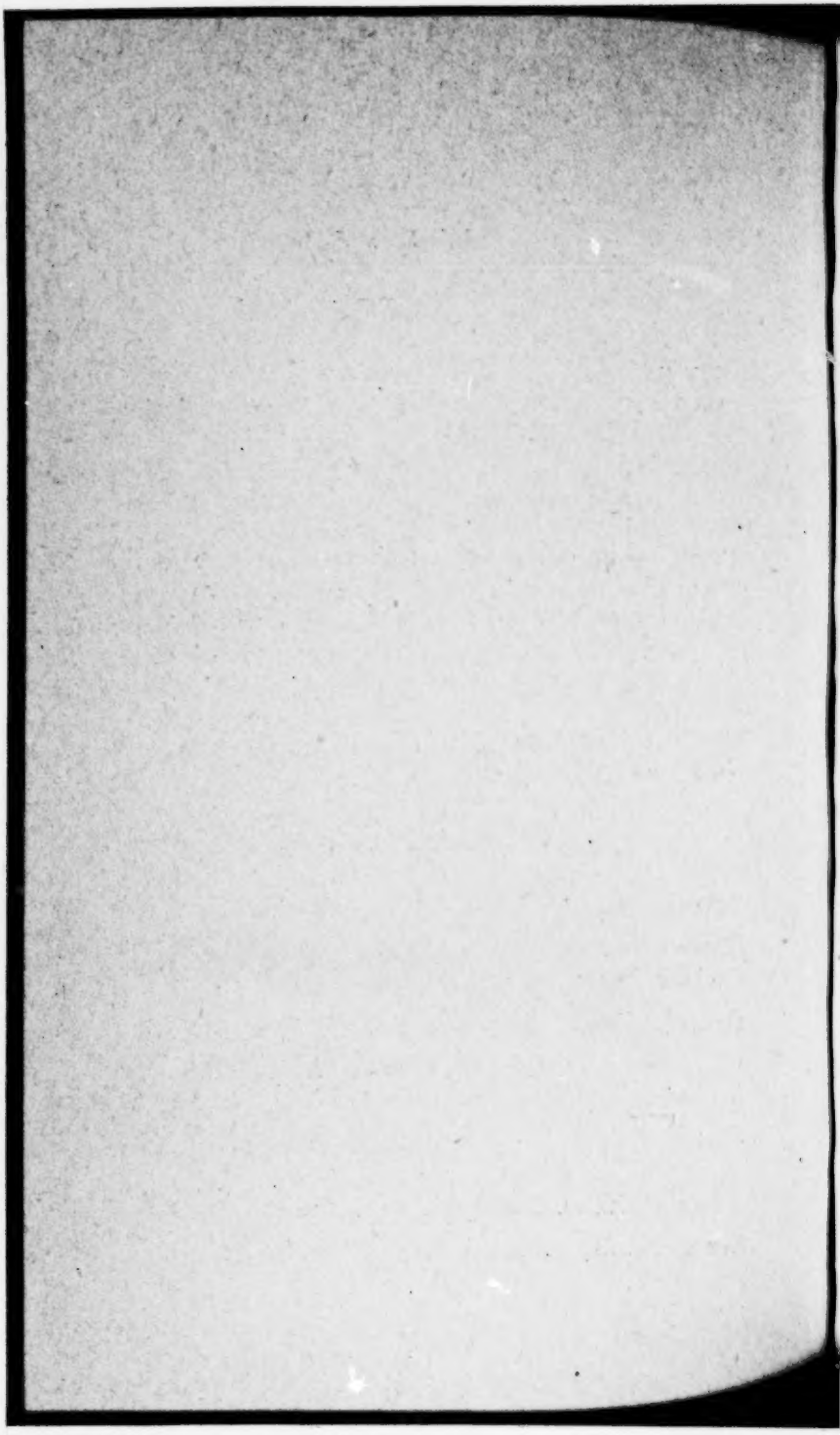

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Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, AGAINST HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, and CLEVELAND WALTON, *Petitioners.*	No. .....

PETITION FOR WRIT OF CERTIORARI.

The Petitioners, Harold Joseph O'Connell, Evan William Aaron, Emanuel Alexander Beach, and Cleveland Walton respectfully petition this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Jurisdiction.

Jurisdiction of this Court is invoked under the Constitution of the United States and the appropriate sections of the United States Code and Judicial Code applicable to writs of certiorari in criminal causes.

Summary Statement of Case.

The petitioners were convicted of the crime of Conspiracy in the Southern District of New York following a trial before District Court Judge Johnson J. Hayes and a jury. Sentences of prison terms and fines were im-

posed. The judgments of conviction were affirmed by the Circuit Court of Appeals, Second Circuit, with an opinion of the Court. Judgment of the Circuit Court was entered January 26, 1948.

The indictment charges conspiracy to steal from railroad dining cars operating in interstate commerce, in violation of Title 18, Section 409 U. S. C. It alleges that petitioners, who worked for the New York Central Railroad Company, O'Connell as a steward, and the others as waiters on a dining car, were required to serve meals to passengers and collect money therefor in behalf of the railroad company. Passengers' meals, according to the rules of the railroad, had to be recorded on meal checks. The checks were supposed to accurately reflect the meals served and the money paid. The steward was obligated to turn over to the designated official of the railroad all meal checks together with the exact amount of money received from passengers.

The indictment charges that the petitioners formulated a scheme to steal from the railroad. By using the same check more than once and by collecting from passengers for meals served without the use of a meal check they were enabled to conceal the true amount received and to pocket the difference. The indictment states that the object of the conspiracy was to

> "• • • collect the price of said meals from said passengers and the proceeds so collected would thereafter be divided among and retained by said defendants and said defendants would convert the same to their own use and benefit and no part thereof would be turned over or paid to the rightful owner thereof, namely, the said New York Central Railroad Company."

The issue submitted to the jury was whether or not the petitioners had conspired to convert to their own use moneys belonging to the Railroad.

The statute involved was 18 U. S. C. 409. This law originally enacted February 13, 1913, 37 Stat. 670, was entitled:

> "An Act to punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages, or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same, * * *."

It provided that whoever committed larceny of an interstate or foreign shipment or knowingly received such stolen property was guilty of a crime. It also covered thefts of baggage in the possession of a common carrier. The act, as it then stood, did not cover thefts from passengers.

On January 21, 1933, this section was amended, 47 Stat. 773. The title of the act remained the same with this addition:

> "by extending its provisions to provide for the punishment of stealing or otherwise unlawfully taking of property from passenger cars, sleeping cars, or dining cars, or from passengers on such cars, while such cars are parts of interstate trains, * * *."

The statute in effect at the time of the commission of the alleged crime reads in part as follows:

> "Sec. 409. *Larceny, etc. of Goods in Interstate or Foreign Commerce; Penalty.* Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, * * * or whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, or from any passenger or from the possession of any passenger while on or in such passenger car, sleeping car, or dining car, * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, * * *."

The only words of the statute applicable to this case are these:

> "whoever shall steal or unlawfully take by any fraudulent device, scheme, or game, from any * * * dining car, * * *."

According to the evidence in the case the petitioners rightfully came into possession of funds in behalf of the railroad company. According to the indictment they schemed to convert these funds to their own use and benefit. According to the submission to the jury the petitioners stand convicted of conspiring to convert to their own use money belonging to the railroad.

The Questions Presented.

FIRST: It is contended that the crime charged is not within the statute since the facts presented a typical case of embezzlement; that the statute does not cover a conversion or embezzlement; that the petitioners did not "steal or unlawfully take • • • from any • • • dining car". They embezzled funds from the Railroad company. They did not steal money from a dining car. Hence they cannot be convicted of a conspiracy to violate Title 18, Section 409 U. S. C.

SECOND: It also contended that the government failed to prove the conspiracy charged, but instead the most that was proved was the existence of six separate and distinct conspiracies and under the authority of *Kotteakos* v. *U. S.*, 328 U. S. 750, the conviction must be reversed.

Reasons Relied on for Allowance of Writ.

The acts alleged in the indictment took place in June and July, 1945. On July 24, 1946, Section 409 of Title 18 U. S. C. was amended. A new provision was inserted in the statute and under its terms the courts for the first time imported the crime of embezzlement into the proscribed acts. The provision reads as follows:

> "(a) Whoever shall • • •
>
> "(5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle, or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both."

Petitioners contend that the courts below disregarded the intent of Congress. The reports of congressional committees show clearly the intent behind this amendment. The petitioners' acts were not made a crime until more than a year after their commission. Thus they stand convicted through the application of a law *ex post facto.*

On the authority of *Kotteakos* v. *United States,* 328 U. S. 750, 66 S. Ct. 1239, it was error to submit the case to the jury on the theory of a single conspiracy because there was no evidence to show that the waiters, steward and chef of the dining car were engaged in a single conspiracy. There were six waiters, a steward and a chef in the dining car. The conceded facts at most establish that the steward, chef, and waiter "A" were engaged in a conspiracy. The facts likewise show that the steward, chef and waiter "B" were engaged in a conspiracy. The same situation existed with respect to the other waiters. Thus the evidence showed that there were six separate conspiracies. The Circuit Court of Appeals was in error in holding that because of the small number of persons in the dining car crew, and the nature of their operations within the car, the jury could find a single conspiracy embracing all of the defendants in the case.

Respectfully submitted,

HAROLD JOSEPH O'CONNELL,
EVAN WILLIAM AARON,
EMANUEL ALEXANDER BEACH

and

CLEVELAND WALTON,

By SOL GELB,
HERBERT ZELENKO,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, AGAINST HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, and CLEVELAND WALTON, *Petitioners.*	No.....

Brief in Behalf of Petitioners in Support of Their Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit.

Statement.

The case against petitioners rested on circumstantial evidence alone. All the evidence concerned happenings on a dining car of a New York Central train which ran from New York to St. Louis. O'Connell was the steward and the other defendants were waiters on the dining car in question. The money collected from passengers for meals was supposed to go to O'Connell whose duty it was to turn it into a change receiver's office at one or the other end of the line (68).

Two round trips were involved, one starting on June 25, 1945, and the other on July 1, 1945. A Government

agent, one Nolan, worked as an assistant steward on both trips. On the first trip to St. Louis he observed six guests served without checks made out for these meals (136-139). On the return trip from St. Louis, according to what he could see, six passengers were served in the same way. On the July 1st trip, several other government agents rode the train as passengers to make observations.

Nolan, together with eight other agents, testified that at each meal they observed a number of passengers served without meal checks. According to Nolan, at one meal twenty-eight persons were served and only thirteen checks were made out (154). At another meal sixty people were served and only forty-two checks were made out (158); at still another thirty guests served were represented by only fifteen checks (170b).

The Government contended that in each instance, the steward, the particular waiter, and the chef each received one-third of the money. To prove this, Nolan testified that when McEwen received three dollars from two passengers and turned it over to O'Connell, steward O'Connell took out one dollar from the cash drawer and gave it to McEwen who pocketed it (130). On another occasion, when Campbell collected a dollar from a passenger he stated to O'Connell that he still owed him seventy cents (139). On still another occasion when Walton collected eighty-five cents for a meal, O'Connell took thirty cents out of the cash drawer and turned it over to Walton (144). Nolan also stated that on occasions when a waiter would collect from passengers for meals not represented by checks, the waiter would go into the pantry where O'Connell joined him. This was the Government's case.

The trial court told the jury that they could infer from the circumstances that all of the defendants were united in one conspiracy. The evidence, he said, showed that the waiters and the steward [illegible] receiving money from passengers for meals not cove[illegible] checks. This meant, he

continued, that they must have been holding out some from the Railroad Company. Inasmuch as the steward and waiter had to work together to do this, it follows, according to the court's instructions, that all of the waiters and the steward must have united on one large conspiracy.

It is the petitioners' contention (Point II) that the evidence does not support this charge.

POINT I.

There Was No Federal Crime Established.

Section 409 of Title 18, as it originally stood, applied to thefts of interstate shipments and baggage in the possession of the carrier. By the amendment of January 21, 1933 (47 Stat. 773) its provisions were extended to include the

> "stealing or otherwise unlawfully taking of property from passenger cars, sleeping cars, or dining cars, or from passengers on such cars, * * *."

In connection with the passage of the amendment the intent of Congress was clearly manifested. The bill (S. 4095, 72nd Cong.) passed the Senate without debate or report. The House Judiciary Committee, however, did make a report (H. Rep. 1791, 72nd Cong. 2nd Sess.). We quote from this report:

> "This bill extends the law making theft from interstate shipments a Federal offense, by amending it to include within its provisions theft of property from passengers on interstate trains. It also prohibits the taking of money from passengers on such trains by means of any fraudulent device, scheme or game.

> "Prosecution of such offenses can not be had under existing law because the property is taken from the possession of the passenger and not the carrier."

When the bill came before the House on December 19, 1932 (Cong. Rec., p. 710, 72nd Cong., 2nd Sess.), the Chairman of the Judiciary Committee stated the following:

> "Sumners, • • • The purpose of this bill is to make it a Federal offense to steal from an individual passenger who is engaged in interstate travel."

When the bill was before the House for the last time, the following remarks were made (Cong. Rec., p. 1897, *et seq.*):

> "Mr. Dyer: I have no objection to including the theft of money from passengers or anything of that kind or of property from passengers. It goes much farther and includes games. If the gentleman will eliminate that part of it I have no objection to it.
>
> "Mr. Sumners: I will accept that amendment. • • •"

Mr. Sumners then offered an amendment striking out the words "fraudulent device, scheme or game." Then it was pointed out by Congressman LaGuardia that there was a necessity for protecting passengers from professional card sharks. Dyer and LaGuardia agreed to strike the word "game" from the Act because the other words in the statute, namely, "fraudulent scheme or device" would cover a fraudulent card game. The statute, however, was not amended.

It is obvious that Congress intended to extend the theft provisions in the original statute to thefts of property and money belonging to passengers, whereas the act, in its original form, was silent on this score. The only

property of passengers that was covered by the original act, was that property which was in the possession of the carrier. The amendment made it a crime to steal passengers' property, not in the possession of the carrier, from a passenger or dining car.

The intent of Congress is made still more manifest by an amendment of Section 409, on July 24, 1946, more than one year after the acts charged in this indictment were committed. Under the new section, Congress for the first time imported the crime of embezzlement into the proscribed acts. The Act contains a new provision, which reads as follows:

> "(a) Whoever shall • • •
>
> "(5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle, or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both."

This provision precisely fits the facts in this case—a classic one of embezzlement. The reports of congressional committees throw additional light on intent. House Report No. 1116 (70th Cong., 2nd Sess.), in part, reads as follows:

> "The purpose of this legislation is to broaden the scope of the present Larceny Act. The existing statute applies only to the larceny of interstate or foreign shipments made by rail, highway, or water. The pending bill combines the crime of embezzlement with that of larceny and makes the

entire act applicable also to air transportation. The penalty remains the same as in the present law. * * *

"Paragraph (4) relates chiefly to the obtaining of money or property by fraud of persons traveling in interstate commerce. It differs from existing law in that it includes embezzlement. The present law applies only to travel by railroads, and protects only the 'passengers' thereon. The pending bill is made applicable in cases of travel in a carrier, by air, by water, or by motor vehicle and protects employees as well as passengers.

"Paragraph (5) is a new matter and makes it a criminal offense for any employee of a carrier riding in or upon the same, to embezzle or convert to his own use, any funds in his custody accruing from or arising out of the transportation of passengers or property in interstate or foreign commerce."

Senate Report 1632 (79th Cong., 2nd Sess.), in part, reads as follows:

"The purpose of this legislation is to broaden the scope of the present Larceny Act. The existing statute applies only to the larceny of interstate or foreign shipments made by rail, highway, or water. The pending bill combines the crime of embezzlement with that of larceny and makes the entire act applicable also to air transportation."

In the Committee Report there is included a letter from the Attorney General to the Chairman of the Committee. In part it reads as follows:

"The bill under consideration would amend existing law by extending it to vessels, aircraft, or other vehicles; to property that is embezzled as well as stolen; and would add a new provision to

> the law that would prohibit an employee of any carrier from embezzling or unlawfully converting to his own use any funds in his custody in connection with such transportation."

In the present state of the case at bar we would have to assume that in the amendment of 1946 Congress legislated to no purpose. The indictment charges that the defendants conspired to convert to their own use money belonging to the Railroad Company. Those acts were not considered a crime prior to the passage of the 1946 amendment. Congress created a new federal crime here. If they did not do that they did nothing.

The word embezzlement is not strange to Congress. As far back as 1914 when wanting to legislate on the subject of conversion of railroad assets, Section 412 of Title 18, was passed. In that section it is provided that every officer of a common carrier

> "who embezzles, steals, abstracts or wilfully misapplies, * * * any of the moneys, * * * or wilfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony. * * *"

That statute deals only with officers. If Congress intended to extend the prohibition to all employees, they certainly did not manifest that intent in the statute invoked in the case at bar. They clearly evidenced it in the 1946 amendment which of course cannot be invoked here, for such a law would be *ex post facto.*

Many laws of Congress have dealt with embezzlement. By way of illustration see: 10 U. S. C. 1566; 12 U. S. C. 264(u); 12 U. S. C. 592; 12 U. S. C. 597; 12 U. S. C. 630; 12 U. S. C. 984; 12 U. S. C. 1121; 12 U. S. C. 1311; 12 U. S. C. 1441(c); 12 U. S. C. 1731(c); 15 U. S. C. 616(c); 18 U. S. C. 176; 22 U. S. C. 79; 22 U. S. C. 102. From

these enactments it must be concluded that Congress recognized that the crime of embezzlement was distinct from other forms of larceny.

We maintain that the facts here present a typical case of embezzlement; that embezzlement has always had a distinct form and a well settled classical meaning. See: *Rex* v. *Bazeley* (1799), 2 East. P. C. 571; *Commonwealth* v. *Ryan*, 155 Mass. 523; *Moore* v. *United States*, 160 U. S. 268; *Weinhandler* v. *United States*, 20 Fed. (2d) 359, 2nd Cir., cert. den., 275 U. S. 554; *Eslick* v. *United States*, 76 Fed. (2d) 706, 6th Cir.; *Crabb* v. *Zerbst*, 99 Fed. (2d) 562, 5th Cir.

Commonwealth v. *Ryan*, 155 Mass. 523, per HOLMES, *J.*, to our mind, contains the best discussion on the subject. That case involved a bartender who was authorized to receive money from customers and place it in a drawer from which, at the end of the day, his employer would take it into his possession. A detective working for the employer, purchased some liquor and the money received by the defendant was momentarily placed in the drawer and then withdrawn and kept by him. The charge was embezzlement. The point was made that inasmuch as he had turned the money over to his employer, what he did amounted to a common law larceny, and not a conversion of funds or an embezzlement. MR. JUSTICE HOLMES, in dealing with this point, wrote as follows (529):

> "It follows from what we have said, that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that, if the defendant, before he placed the money in the drawer intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny."

He then went on to say that this type of case has been regarded as embezzlement in England for the last hundred years. On the general subject he stated (p. 527):

> "We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian."

It seems clear and beyond the point of dispute that the acts involved in the case at bar constituted embezzlement. Hence the conclusion should follow that the statute does not apply. We assume, however, that it will be argued that even if within the well recognized forms the acts constitute embezzlement, those acts can still constitute a violation of the statute. For it undoubtedly will be argued that when Congress used the words "steal or unlawfully take * * * from a dining car * * *," it did not restrict itself by classical definitions. It remains, then, to decide whether those who embezzle can nevertheless, be guilty of stealing or unlawfully taking, within the meaning of the statute; or, put in another way, whether Congress ever intended to cover the crime of embezzlement by the 1933 amendment to the statute. It comes down to a matter of interpretation of words.

In passing upon Section 409, the circuit court has said that in its interpretation it is not bound strictly by common law definitions of larceny. *White* v. *United States,* 273 Fed. 517, 2nd Cir.; *United States* v. *Handler,* 142 Fed. (2d) 351, 2nd Cir.; *United States* v. *DeNormand,* 149 Fed. (2d) 622, 2nd Cir. We suppose all that means is that the words of the statute must be interpreted in their well recognized meaning and in accord with the intent of Congress. Nevertheless, to determine whether the acts of the defendants

come within the proscribed words we must weigh them in the light of well recognized concepts. Therefore, if we interpret the words "whoever shall steal or unlawfully take * * * from a dining car * * *," as embracing acts of embezzlement, we are ignoring its accepted definition. These defendants converted funds which had been intrusted to them by their employer. It would be unreal to say that they stole or unlawfully took from a dining car. Courts without number have defined what they did as embezzlement. Are we to assume that Congress wrote a new definition? Or that Congress did not know how to draw legislation to cover such wrongs? The history of congressional enactments gives the complete answer to it. When Congress used the words in question, it did not disguise its intent. Rather was such intent plainly set forth. We must assume that when Congress in 1946, amended the law to include an embezzlement provision, it legislated to some purpose.

To hold, as does the Circuit Court of Appeals, that "the statutory language in declaring punishable anyone who 'shall take by any fraudulent scheme' any money 'from any dining car' * * * moving in interstate commerce" defines embezzlement or was intended to define embezzlement, constitutes in our view a disregard of the intent of Congress and of numerous federal statutes on the subject of embezzlement. Neither is it correct to say, in the light of legal standards, that the words of the statute define embezzlement. Nor is there any basis for the court stating that the 1946 amendment to the statute was merely a "clarifying amendment."

The case of *Stone* v. *United States,* 153 F. 2d 331 (C. C. A. 9) upholding conviction of members of a dining car crew upon similar facts is, in our opinion, no real authority on the point raised here, for there the opinion of the Court is silent on the subject. The brief in behalf of the defendants contains no argument of the question, and no

citation of authorities. There was only a short statement to the effect that the facts in that case make out the crime of embezzlement and not the crime charged. It is our view that under the circumstances the point was actually not raised, and that if it be deemed that the Circuit Court of Appeals did pass upon the point, although the opinion is silent on it, with the utmost respect, we assert that the decision is erroneous.

POINT II.

The Government failed to prove the conspiracy charged. Under the authority of Kotteakos v. United States, 328 U. S. 750, the conviction must be reversed.

The indictment alleges a single conspiracy encompassing all of the defendants. The record is barren of any evidence which shows a connection between all of the defendants involved in one conspiracy. The most the Government proved was that there were at least six separate and individual conspiracies, each one distinct and apart from any of the others and each one dealing with one of the waiters, the steward and the chef.

Even if these individual conspiracies were similar, it was prejudicial and improper to join all of them to make a mass trial of this case. The only reason that this was done was to permit some of the evidence relating to one conspiracy to be considered or to influence the jury in regard to the others. It is conceded that in certain instances similar separate conspiracies may properly be joined and tried, but this was not the theory on which the instant case was prosecuted. The indictment charges one conspiracy, the prosecution contended throughout that it was one conspiracy and the Judge in his charge emphasized this contention to the jury (R. 681, *et seq.*).

Analyzing the evidence, and only for the purpose of this argument conceding that the conspiracy to embezzle in

this case constituted a crime, we find that O'Connell, the steward, was the hub upon which the acts of all the waiters and chef revolved. Yet, there was no testimony, direct or circumstantial, that all were connected. The money transactions between the waiters and the steward were supposed to be payoffs in a single conspiracy. Yet each of the payoffs were separate and distinct and related only to the waiter involved. The oral orders were taken at sporadic intervals and were a very small portion of the entire number of meals actually served on the trains. Obviously, the crimes, if any, were committed when the opportunity offered and only between a specific waiter and the steward. There was no evidence of any concerted action between waiters. There was not even any evidence that any two waiters conversed with each other at any time on any subject, or that more than one waiter served a particular table at any time. How could this evidence tend to prove a single conspiracy?

The circumstances in this case are strikingly similar to those in *Kotteakos* v. *United States*, 328 U. S. 750, 66 S. Ct. 1239. In that case one Brown was the chief conspirator who testified for the Government and gave direct testimony concerning the conspiracy. He testified that he had numerous dealings with every one of the alleged conspirators either individually or in groups, but that his dealings with each group or individual was separate and apart from his dealings with any other group or individual. He was the hub around which all the alleged conspiracies revolved. At page 1243 the Court said:

> "As the Government puts it, the pattern was 'that of separate spokes meeting at a common center', though we may add, without the rim of the wheel to enclose the spokes."

That situation holds in this case.

The *Kotteakos* case, in which this Honorable Court held there were eight separate conspiracies, was even a stronger one for the prosecution. The Government there had direct testimony from Brown concerning the conspiracy, whereas in the instant case the prosecution dealt only with certain "overt acts" of the defendants. In the *Kotteakos* case the trial court charged the jury that the conspiracy was a single and individual case and could not be broken up. In the instant case the court similarly charged the jury (681, *et seq.*). The charge here, as in the *Kotteakos* case, was erroneous because there was no evidence that one and only one conspiracy was in existence. In the *Kotteakos* case the trial court charged the jury that the evidence showed but one conspiracy although actually this was not the fact. In the instant case the court charged the jury similarly and likewise there was no evidence upon which the court based this portion of its charge. Any argument that the conviction in this case should not fall because individual conspiracies were properly joined, must fail for the reason that the case was tried upon the theory of an individual conspiracy, and there is insufficient evidence to prove a *prima facie* case of such a conspiracy. This serious error permeated the entire case and was not merely technical or harmless.

For instance, as to the appellants Beach and Aaron, the only evidence against them is that they took oral orders. This was also true of a waiter named Campbell who was not even indicted or listed as a conspirator. There was no evidence that any of these men engaged in any money transactions. The most that was indicated was a violation of company rules. To join Aaron's and Beach's case with those of the others is contrary to existing law and indicates the danger of mass trials. Upon the record there appears no reason why Beach and Aarons were even brought to trial.

What the Government has done here is to combine a series of acts which at most would have amounted to in-

dividual petty larcenies. Lacking proof of such larcenies because there was no evidence that any goods or moneys were missing, it joined the charges against all of the defendants into one mass with the hope that the atmosphere, the violation of company rules in the presence of agents of the Federal Bureau of Investigation, and the sheer weight of the large number of defendants would result in a conviction. In this the Government succeeded despite the fact that it did not legally prove the crime charged. Such tactics were condemned in the *Kotteakos* case.

In the *Kotteakos* case, the Supreme Court stated as follows at page 1253:

> "With all deference we disagree with that conclusion and with the rulings that the permeating error did not affect the substantial right or rights of the parties. That right in each instance was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by others."

and further at page 1253:

> "We have not rested our decision on the fact that the offense charged and those proved were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small but as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for the miscarriage of justice to particular individuals becomes greater and greater."

See also *Tinsley, et al.* v. *United States,* 43 F. (2d) 89 (C. C. A. 8, 1930), pp. 892, 893; *Mercante, et al.* v. *United States,* 49 F. (2d) 156 (C. C. A. 10, 1931), 158; *Wyatt* v. *United States,* 23 F. (2d) 791, 792; *United States* v. *Siebricht, et al.,* 59 F. (2d) 976 (C. C. A., 1932) 978.

The Circuit Court of Appeals for the Second Circuit erred in holding that the instant case is unlike the *Kotteakos* case but similar to the situation in *Blumenthal* v. *U. S.*, 68 Sup. Ct. 248. There can be no dispute that in the present case the dealings between each individual waiter and the steward and chef was a separate, distinct and unrelated conspiracy to any other similar transaction on board the train. There is no evidence to the contrary nor can proper inference to the contrary be held tenable.

Mere knowledge that others were engaged in like enterprises does not bind the individuals into one conspiracy. Nor does physical proximity. In the *Blumenthal* case each salesman knew that he was part of a larger plan and that his lot was part of a larger lot. Knowledge that the participant was part of a larger conspiracy was thus properly imputed to each defendant. It was on the foregoing portion of the *Blumenthal* dictum that the lower court in this case became confused.

In the *Blumenthal* case each separate agreement was a stage in the formation of a larger over-all inclusive combination. Here the situation was strikingly similar to that of the *Kotteakos* case. Each transaction between a waiter and the steward and chef was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for the chef and steward the common figures, no conspirator was interested in whether any deal except his own went through.

The allegedly illegal transactions were sporadic as to time and personnel and there was no evidence or proper inference by the very nature of the acts that it was ever necessary for more than one waiter to be in it to make it work.

A far more serious question is also involved. There is no evidence of a conspiracy. There is no evidence that anything was stolen. The records of the railroad com-

pany are in proper shape accounting for all of its merchandise and funds. The lower courts have sustained a conviction based not upon a proven crime but upon a proven violation of the operating rules of a private enterprise in the conduct of its business.

It is true that proof of a conspiracy to steal does not require actual theft to take place but may be proved by the illegal agreement, or in the absence of proof of such illegal agreement proof of theft can prove the agreement by inference. There is no proof of theft nor of an illegal agreement. There is no proof of crime and if the conviction be permitted to stand, a grave miscarriage of justice will result.

CONCLUSION.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

Sol Gelb,
Herbert Zelenko,
Counsel for Petitioners.

Motion to Dispense With Printing of Record.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, AGAINST HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, and CLEVELAND WALTON, *Petitioners.*	No. .....

Upon all of the proceedings had heretofore herein and upon the annexed affidavit of Herbert Zelenko, one of the counsel, the petitioners respectfully move this Honorable Court for permission to dispense with the printing of the record and for such other and further relief as in the premises may be deemed just and proper.

Yours, etc.,

HERBERT ZELENKO, ESQ.,
One of the Counsel for Petitioners.

Affidavit of Herbert Zelenko.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, AGAINST HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, and CLEVELAND WALTON, *Petitioners.*	No.....

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HERBERT ZELENKO, being duly sworn says:

I am a member of the bar of this Honorable Court and one of the counsel for petitioners herein. I am fully familiar with all of the proceedings had heretofore herein.

This motion to dispense with the printing of the record is based upon the fact that the petitioners are indigent and do not have funds to pay for printing the record which is over seven hundred (700) typewritten pages. The Circuit Court of Appeals for the Second Circuit granted a like motion upon similar grounds.

Counsel for the petitioners are serving in this proceeding without fee and have paid for the printing of the petition from their own funds.

By reason of all of the foregoing, it is respectfully urged that the motion to dispense with printing the record be granted.

HERBERT ZELENKO.

Sworn to before me this
24th day of Feb., 1948.

HAROLD L. SCHWARTZ,
Notary Public,
N. Y. County.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 625

HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, AND CLEVELAND WALTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 727–730) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 26, 1948 (R. 731). The petition for a writ of certiorari was filed February 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether 18 U. S. C. 409, providing for the punishment of "whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any * * * dining car * * * any money," applies to employees on a railroad dining car who, by means of a fraudulent scheme whereby they turned in to their employer fewer meal checks than the number of meals they served, appropriated moneys received from passenger guests in payment for meals.

2. Whether the evidence sufficiently established a single conspiracy as charged.

STATUTE INVOLVED

Section 1 of the Act of February 13, 1913, c. 50, 37 Stat. 670, as amended by the Act of January 21, 1933, c. 16, 47 Stat. 773 (18 U. S. C. 409), provided in pertinent part, during the period of the alleged conspiracy (June–September, 1945)[1] as follows:

> * * * whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, or from any passenger or from the possession of any passenger while on or in such passenger

[1] This section was again amended by the Act of July 24, 1946, c. 606, 60 Stat. 656. See p. 7, *infra*.

> car, sleeping car, or dining car, when such car is a part of a train moving [in interstate commerce], any money, baggage, goods, or chattels * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

An indictment (R. 1b–1i) filed in the District Court for the Southern District of New York charged petitioners and six other defendants with conspiracy to violate 18 U. S. C. 409 by stealing and unlawfully taking money, by fraudulent devices and schemes, from dining cars of the New York Central Railroad Company while such cars were parts of trains moving in interstate commerce. Petitioners were found guilty following a jury trial (R. 691).[2] O'Connell was sentenced to imprisonment for one year and a day and to pay a fine of $1,000 (R. 713), Aaron to imprisonment for six months and to pay a fine of $200 (R. 715), and Beach and Walton to imprisonment for six months and to pay a fine of $300 each (R. 719, 717). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 731).

The evidence adduced by the Government may be summarized as follows:

---

[2] Severances were granted as to two of petitioners' co-defendants (R. 23), and the other four entered pleas of guilty (R. 20–21, 459).

Petitioner O'Connell was the steward assigned to the dining car of a New York Central Railroad train which made regular round-trip runs between New York City and St. Louis, Missouri (R. 49–52). The other petitioners and three of the defendants who pleaded guilty were the waiters on the same dining car (R. 52, 152). The fourth defendant who pleaded guilty was the chef (R. 52, 459).

The procedure set up by the railroad for its dining cars was this: When a passenger entered the dining car to be served, he was seated and presented with a menu, a check, and a pencil. The passenger wrote his order on the check, which was then picked up by the waiter assigned to his table. The waiter read the order back to the passenger, leaving the original of the check on the table, and presenting a duplicate, or carbon copy, to the chef, who filled the order. When the passenger finished his meal, the waiter presented the original of the check to the steward to have the cost of the meal recorded on it, and the waiter then presented it to the passenger for payment. The waiter gave the check and the money to the steward, who placed them in his cash drawer. The steward later turned in the original checks, and the chef the duplicates, to a company office. (R. 62–64.) Passengers were not permitted to give their orders orally. If a passenger was unable, or refused, to write out his

order, the waiter notified the steward, who wrote the guest's order for him. (R. 65.)

Evidence was adduced that in numerous instances petitioners Aaron, Beach, and Walton, and the other waiters assigned to petitioner O'Connell's dining car, took oral orders from passengers, orally advised them of the amount due, and collected the money without the presentation of any check whatever. Sometimes the waiters would pretend to write passengers' orders on checks and later orally inform them of the amounts due, without presenting the checks to them. Sometimes previously used checks would be presented. Occasionally a blank check would be laid on the table by the steward, O'Connell, when the passenger was first seated, and either the steward or the waiter would then pick up the check before the passenger had a chance to write his order, which would then be taken orally. (R. 310–325, 346–356, 375–386, 400–413, 473–486, 511–517, 526–536, 547–554.)

Ralph Nolan, an F. B. I. agent, testified that, posing as a student steward, he was assigned to work under petitioner O'Connell and made two round trips with him in that capacity (R. 120–121, 170f). When he first met O'Connell, the latter told him that "there was big money to be made on the job," that "a new man should work along and keep his nose clean," and that, though "when he started to work nobody told him anything," he

"was doing all right now" (R. 124). On numerous occasions, while meals were being served, O'Connell told Nolan to leave the dining car and "take a rest in the men's lounge"; Nolan did as instructed at first, but later told O'Connell that he "needed the experience" and so was allowed to remain throughout the meal periods (R. 132, 140, 146, 153, 158, 165). In addition to testifying to numerous violations of company regulations, of the types previously indicated, on the part of the waiters and O'Connell (see, e. g., R. 129–130, 133–150, 155–157), Nolan testified that on three occasions he was instructed by O'Connell to "abstract" the meal checks following a meal period, this process consisting of counting the number of persons served according to the checks and totaling the cash receipts; in each instance the number of checks was substantially less than the number of persons who had actually been served according to Nolan's observations (R. 153–154, 158, 170a–170b). Nolan also testified that on one occasion, after one of the waiters had given O'Connell $3 which he had received from two passenger guests, O'Connell placed the money in his cash drawer and then immediately withdrew $1 and gave it to the waiter (R. 129–130). On another occasion, after a guest had finished an orally ordered meal, O'Connell "paged through" some used checks and "selected one," which he presented to the guest; when the guest paid the waiter who had served him, the waiter gave O'Connell the check with a

$1 bill, saying that he "still owed [O'Connell] 70 cents," and "reached in his pocket and took some small change out and gave it to O'Connell" (R. 139; see also R. 169). On yet another occasion, Nolan observed a waiter take an oral order from one guest and a written order from another guest at the same table; the waiter later collected $1 from each of the guests, and turned the money over to O'Connell together with the single check, saying that "One was on and one was off" (R. 157). On numerous occasions, after a waiter had delivered to O'Connell money which he had collected on an oral order, Nolan noticed that the waiter "would go into the kitchen" and that O'Connell "would follow him" (R. 170m–170p).

ARGUMENT

1. Petitioners contend that as originally enacted the substantive statute applied only to thefts of interstate shipments and baggage (18 U. S. C. 409); that the committee reports and pertinent debate on the amendment here involved (January 21, 1933, *supra*, pp. 2–3) disclosed that that amendment was designed only to protect the property of passengers and not to cover embezzlement; and that it was not until the statute was amended on July 24, 1946 (c. 406, 60 Stat. 656), subsequent to the conspiracy charged, that the crime of embezzlement was added to the offenses penalized by the statute (Pet. 9–17).

There can be no doubt, as is indicated by the legislative materials to which petitioners refer

(Pet. 11–13), that the 1946 amendment was regarded as importing the new crime of embezzlement into the statute, but to us it seems clear that on its very face the statute prior to the amendment of 1946 encompassed embezzlement.

While it cannot be denied, as is disclosed by the legislative data cited by petitioners (Pet. 9–10), that the amendment of 1933, the one here in controversy, was aimed primarily at offenses involving the property of passengers, the language which Congress employed was not so limited. In addition to thefts from or the defrauding of passengers of their money, baggage, goods, or chattels in their possession, the 1933 amendment penalizes "whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, * * * any money, baggage, goods, or chattels" (*supra,* pp. 2–3). This language is obviously not confined to thefts or takings of property of passengers from dining, passenger, and sleeping cars. It involves thefts or takings of money or other property from anyone so long, of course, as it is taken from a passenger, sleeping, or dining car, rather than, for example, a baggage car. There is no qualifying language limiting the "money, baggage, goods, or chattels" to that of passengers. The property of the railroad or of its employees clearly cannot be excluded under the language employed. Nor is there any basis for the view that under the

language utilized the statute should be construed to include the theft by a waiter of silverware from the dining car but to exclude the embezzlement by the waiter of money collected from a passenger for a meal. The amendment involves not only "stealing" but also "unlawful taking" by "any fraudulent device" or "scheme". Language of this character clearly goes beyond common law larceny,[3] and involves any unlawful taking of which fraud is an element. Embezzlement certainly constitutes "unlawful taking" and fraud is the very essence of embezzlement, involving as it does the abuse of the confidential relationship existing between the appropriator and the owner of the property appropriated. Miller, *Criminal Law*, p. 379. In *Stone* v. *United States*, 153 F. 2d 331 (C. C. A. 9), the statutory provision in question was applied without controversy to a conspiracy prosecution involving facts substantially similar.

2. Petitioners also contend (Pet. 17–22) that the Government established, not one conspiracy, as charged, but six conspiracies, each involving the steward, the chef, and one of the six waiters. They argue that each waiter dealt only with the steward and the chef, and not with any of the

[3] Cf. *United States* v. *De Normand*, 149 F. 2d 622, 624 (C. C. A. 2), certiorari denied, 326 U. S. 756, and *United States* v. *Handler*, 142 F. 2d 351 (C. C. A. 2), certiorari denied, 323 U. S. 741, and the statutory provisions there considered.

other waiters. They thus seek to equate the facts in this case to those in *Kotteakos* v. *United States*, 328 U. S. 750, where a number of separate conspiracies, each having a common figure, were prosecuted as a single conspiracy. The contention is without merit.

The facts in this case are clearly different, and substantially so, from those of the *Kotteakos* case. There, Brown, the common figure in the multiple conspiracies, acted as broker for numerous persons in the fraudulent procurement of loans under the National Housing Act. No connection whatever was established among any of Brown's principals. Here, on the other hand, the steward, the chef, and the six waiters all formed a tight little group engaged in serving meals to passengers in a single railroad dining car. All, obviously, knew one another, and were in daily contact with each other. It was, therefore, beyond the realm of reasonable possibility that each waiter did not perceive that the other waiters were engaging in the same sort of fraudulent transactions with the steward and chef that he himself was engaging in. Under the circumstances, the jury were plainly justified in believing that each waiter knew that his arrangement with the steward and chef was part of a larger scheme, to which his fellow waiters were parties, and that he knowingly consented to playing his role in the larger plan. A single conspiracy was, therefore, made out. See

Blumenthal v. *United States*, 332 U. S. 539, 553–559.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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MARCH 1948.

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